A PROPOSED NEW DEFINITION OF A TORT.

NOT only in Jurisprudence, but in its sister sciences, for instance, Ethics and Economics, do we find striking illustrations of the truth that it is concerning the most fundamental and far-reaching definitions, that there exists the most doubt and dispute. Although acts such as we call *torts* have been committed since the dawn of the idea of the existence of rights as between man and man, yet the development of anything like a clearly formulated conception of a tort is surprisingly recent. Thus, so late as 1886 it was said by Sir Frederick Pollock that "if the collection of rules which we call the law of torts is founded on any general principles of duty and liability, those principles have nowhere been stated with authority." [1]

But it seems to us to scarcely remain true, as stated by the same authority, that "the want of authoritative principles (*i. e.*, on this subject) appears to have been felt as a want by hardly any one." [2] The necessity of establishing such principles is rapidly being forced upon us by decisions involving modern conditions,[3] thus, decisions relating to strikes and boycotts. But these very decisions seem to us to furnish the material for constructing a satisfactory definition of a tort.

We need not dwell at length on previous attempts to define a tort. The New York Court of Appeals has complained of its inability "to find any accurate and perfect definition of a tort." [4] Mr. Addison in his elaborate treatise entirely avoids definition thereof. Sir Frederick Pollock defines it as "an act or omission giving rise, in virtue of the common law jurisdiction of the court, to a civil remedy which is not an action of contract." [5] Professor Jaggard in his recently published treatise, says that "the above definition of Mr. Pollock, while a negative one, seems to be least unsuccessful and unsatisfactory." [6] Judge Cooley thinks that the

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[1] Pollock, Torts, 4. [2] Pollock, Torts, 5.

[3] See, for instance, Mogul Steamship Co. *v.* McGregor, [1892] App. Cas. 25; Allen *v.* Flood, [1898] App. Cas. 1.

[4] Rich *v.* N. Y. Central, &c., R. R. Co., 87 N. Y. 382, 390 (1882, Finch, J.).

[5] Pollock, Torts, 4. [6] Jaggard, Torts, i. 2.

definition given in the English Common Law Procedure Act, "a wrong independent of contract," "is perhaps as good a definition as can be given."[1] Mr. Bishop's definition is "an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, one's disturbance of another in rights which the law has created, either in the absence of contract, or in consequence of a relation which a contract had established between the parties."[2]

But these definitions merely exclude from their scope injuries resulting from breach of contract; they leave us without a criterion to apply to that vast field of injuries wholly unconnected with contract. No line of separation is established between, for instance, the injuries resulting from words that are, and those that are not, privileged, or between acts of a landowner that are, and those that are not, tortious.

The illustrations already given foreshadow our definition. It seems to have already been apprehended that a classification, if not a definition, of torts may be based on the *relation* of some party concerned. Such classification, as thus far attempted, has referred rather to some relation of *the party injured*, than of *the party committing the injury*.[3]

But, in seeking to establish our definition of a tort, we propose to look, not to any relation of the injured party, but to *the relation of the party committing the injury*. In this view, an injury having been committed, the answer to the question whether it is actionable as a tort will in some way depend upon the *relation* of such party. In the hope of being able to justify our definition, we here state it as "*an act or omission, not a mere breach of contract, and producing injury to another, in the absence of any existing lawful relation of which such act or omission is a natural outgrowth or incident.*"

Injuries committed by the proprietor of land seem to furnish excellent material for the test and application of our definition. For instance, where, as the result of the owner of land digging a ditch thereon, the owner of adjoining land was injured, in that water was diverted from his well, it was properly held that no action would

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[1] Cooley, Torts, 2d ed., 3.

[2] Bishop, Non-Contract Law, 4.

[3] See, for instance, the learned discussions by Prof. Wigmore on "The Boycott and Kindred Practices as Ground for Damages," in Am. Law Rev., xxi, 509 (1887), and on "A General Analysis of Tort Relations" in HARVARD LAW REVIEW, viii, 377 (1895). In the former article are discussed *the relations of the injured party* to customers, servants, and contractors.

lie.[1] What was the proper ground of this decision? Simply this, that digging the ditch was *a natural outgrowth or incident of the relation of landowner.* But not every act done upon land by the owner thereof is a natural outgrowth or incident of his relation as such owner. An illustration is furnished by a resurrected decision[2] that gave some of the judges so much trouble in Allen *v.* Flood. There an action was held to lie for firing a gun on one's own land, whereby wild fowl were frightened from a neighbor's decoy. As is well said by Lord Herschell in Allen *v.* Flood,[3] Keeble *v.* Hickeringill "may be supported by the circumstance that, *if the defendant merely fired on his own land in the ordinary use of it,* his neighbor could make no complaint, whilst, *if he was not firing for any legitimate purpose connected with the ordinary use of land,* he might be held to commit a nuisance." Here the court come pretty near a conception of a tort as we have defined it, saying in effect that the injury under consideration in Keeble *v.* Hickeringill was actionable, because produced by an act that was not *a natural outgrowth or incident of the relation of landowner.*

The relation of *employer* will be found to sustain the legality of acts which, though producing injury to an employee or a third person, are yet natural outgrowths or incidents of the relation. Thus, the injury done to an employee by discharging him is not actionable, in the absence of contract. So we are enabled to perceive the true ground of such decisions as Heywood *v.* Tillson,[4] where the refusal of an employer to employ or retain in his service any person renting specified premises, was held to give no right of action to the owner of such premises. The same may be said of Payne *v.* Western and Atlantic R. R. Co.,[5] holding that no action would lie for discharging (or threatening to discharge) employees because of their patronage of the plaintiff. A contrary view was taken in International and G. N. Ry. Co. *v.* Greenwood;[6] Graham *v.* St. Charles Street R. R. Co.[7] But might not the result have been otherwise in these cases, had the courts been guided by the definition of a tort as we have stated it? Such acts of an employer as "lockouts" and "blacklisting" may also be suggested as properly subject to the test we have indicated.

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[1] Phelps *v.* Nowlen, 72 N. Y. 39 (1878).
[2] Keeble *v.* Hickeringill, 11 East, 574 (1706).
[3] [1898] App. Cas. 1, 133.
[4] 75 Me. 225 (1883).
[5] 13 Lea (Tenn.), 507 (1884).
[6] 2 Tex. 76 (Civ. App. 1893).
[7] 47 La. Ann. 214 (1895).

The relation of *party to a lawful contract* seems to be the basis of the legality of certain acts. Thus where no action was held to lie for procuring a discharge from employment, by threatening the employer that the defendant would terminate a contract, that by its terms he had the right to terminate at any time.[1] So where an action by a member of a combination among fire insurance companies and agents to fix rates, was held not maintainable as for a conspiracy to destroy the plaintiff's business as an insurance agent, merely because of the combined action of the defendants to enforce the rules and penalties against him, as by imposing fines and revoking agencies.[2]

But the most conspicuous relations are two that have within recent years been rapidly brought to the front by modern trade conditions, namely, those of *trade competitor* and of *employee.* And, conspicuous among the many weapons used by trade competitors and by employees, stand the act of inducing a refusal to deal and the kindred act of inducing a breach of contract.

It seems long ago to have been recognized, that the relation of trade competitor might furnish a justification for all acts the natural outgrowths or incidents of such relation. Thus, in a decision made in 1410,[3] and frequently referred to in Allen *v.* Flood, where no actionable wrong was held to have been committed by a schoolmaster in setting up a school to the damage of an ancient school, whereby the scholars were allured from the ancient school to come to his. Another instance of the recognition of such relation is found in Bowen *v.* Matheson.[4] Nevertheless, until comparatively recently, this relation seems to have been largely ignored. This is strikingly manifest from a comparison of Lumley *v.* Gye[5] with Mogul Steamship Co. *v.* McGregor.[6] In Lumley *v.* Gye what should have been a fundamental consideration was in our view completely ignored. There, after elaborate discussion, was interjected into our jurisprudence the doctrine of liability for inducing a breach of contract (in this case, to perform at a theatre). But, assuming that under any conditions such a liability exists, the court should have gone farther and considered such questions as these: In what relation stood the party doing the injury complained of? Was it that of employee, trade competitor, or the like? Was such relation a law-

[1] Raycroft *v.* Tayntor, 68 Vt. 219 (1896).
[2] Beechley *v.* Mulville, 102 Iowa, 602 (1897).
[3] 11 Henry IV., Fol. 47, Pl. 21.
[4] 14 Allen (Mass.), 499 (1867).
[5] 2 El. & Bl. 216 (1853).
[6] [1892] App. Cas. 25.

ful one? Was the act of inducing a breach of contract a natural outgrowth or incident of such relation? Now, there is no reference whatever, in the points of counsel or in any of the elaborate opinions in the case, to the circumstance that the relation of the defendant to the plaintiff was that of *trade competitor.* In the view we have taken, the main question for consideration in Lumley *v.* Gye was simply whether the act of inducing a breach of contract created any liability, in view of such act being the natural outgrowth or incident of the relation of trade competitor. The matter was discussed on the proper ground in Bourlier *v.* Macauley,[1] where it was held not actionable for *a rival theatrical manager* to induce an actress to break her engagement at another theatre, *for the purpose of performing at his own.* The court here follow Chambers *v.* Baldwin,[2] where it was held not actionable for *a trade competitor* to cause the breach of a contract to sell goods, *with the design of himself becoming purchaser.* The court say: "*Competition in every branch of business being not only lawful, but necessary and proper,* no person should or can upon principle be made liable in damages, for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business." In Mogul Steamship Co. *v.* McGregor, the relation of the parties committing the acts complained of, is not ignored, as in Lumley *v.* Gye. Nay, rather "the stone which the builders rejected, the same is become the head of the corner," and the decision is in effect on the ground that such acts were the natural outgrowths or incidents of the relation of trade competitor. Thus it was said in the Court of Appeal[3] by Bowen, J., who, of all the judges rendering opinions in that celebrated case, seems to have most clearly comprehended the real point involved: "The defendants have done nothing more against the plaintiffs, than pursue to the bitter end a war of competition, waged in the interest of their own trade." That is to say, the injuries done by the defendants to the plaintiffs were but the natural outgrowths or incidents of the relation of trade competitor, and hence not actionable.

Limitations of space forbid us to discuss at length the recent applications of the relation of trade competitor, as a justification of injuries produced by acts the natural outgrowths or incidents

[1] 91 Ky. 135 (1891).
[2] 91 Ky. 121 (1891).
[3] 23 Q. B. D. 598, 614 (1889).

thereof. See for instance Lough *v.* Outerbridge;[1] Continental Ins. Co. *v.* Board of Underwriters.[2] We content ourselves with a passing reference to the clashing authorities on the question of the legality of a boycott of a trade competitor. As sustaining its legality we cite Bohn Manuf. Co. *v.* Hollis;[3] Macauley *v.* Tierney;[4] to the contrary are Jackson *v.* Stanfield;[5] Olive *v.* Van Patten.[6]

We pass to the relation of *employee*. Out of the fogs and mists of obscurity and difficulty that have hitherto enveloped discussions as to the legality of the acts of employees, especially when acting in combination, there seems to be now emerging the clear conception of the test of *the relation of employee* by which to determine the legality of a given act of an employee. A great step in advance will have been taken, when once it is generally apprehended that the same test is applicable to the relation of employee, as to that of trade competitor, or, to put it in another way, the employee is, for the purpose of applying this test, to be regarded as a competitor of his employer. This view seems to have been adopted in Allen *v.* Flood; and see Sinsheimer *v.* United Garment Workers;[7] dissenting opinion of Holmes, J., in Vegelahn *v.* Guntner;[8] dissenting opinion of Caldwell, J., in Hopkins *v.* Oxley Stave Co.[9] But see, on the other hand, Barr *v.* Essex Trades Council.[10] Now, in the two cases last cited, where it was held actionable for employees (or persons acting in their behalf) to induce third persons to refuse to deal with their employers, had the question been clearly presented to the courts whether the acts of the employees were not *the mere natural outgrowths or incidents of their relation as employees*, different conclusions might have been reached. These observations are also applicable to such decisions as Moores *v.* Bricklayers' Union;[11] Old Dominion Steamship Co. *v.* McKenna;[12] Casey *v.* Cincinnati Typographical Union.[13] But here, as before, limitations of space forbid us to discuss at length the cases where the test of the relation of employee was or might have been applied.

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[1] 143 N. Y. 271 (1894; closely following Mogul Steamship Co. *v.* McGregor).
[2] 67 Fed. Rep. 310 (Cir. Ct. Cal. 1895).
[3] 54 Minn. 223 (1893).
[4] 19 R. I. 255 (1895).
[5] 137 Ind. 592 (1894).
[6] 7 Tex. 630 (Civ. App. 1894).
[7] 77 Hun (N. Y.), 215 (1894).
[8] 167 Mass. 92, 107 (1896).
[9] 83 Fed. Rep. 912, 936 (C. C. A. Eighth Cir., 1897).
[10] 53 N. J. Eq. 101, 124 (1894).
[11] 7 Ry. & Corp. L. J. 108 (Super. Ct. Cinn. 1889).
[12] 30 Fed. Rep. 48 (Cir. Ct., N. Y., 1887).
[13] 45 Fed. Rep. 135 (Cir. Ct., Ohio, 1891).

A strong justification of our definition is that, so far as concerns an injury produced by mere words, as in case of slander and libel, it is already in effect applied in the doctrine of privilege. Acts of fraud or negligence are clearly tortious under our definition, not being the natural outgrowths or incidents of any lawful relation.

An incidental benefit of the adoption of our definition, would be the abandonment of false and misleading tests of liability that have wrought so much confusion. Conspicuous is the test of intent, which has received from Allen *v.* Flood its death-blow in England. It is to be hoped that Allen *v.* Flood will soon be generally followed on this point in this country. Perhaps the same condemnation should be extended to the idea that has, somehow or other, of recent years, no one seems to know just how, sneaked into our jurisprudence, that a civil liability is created by a number of individuals doing in combination what it would be lawful for each to do singly. If this idea ever had any foothold in British jurisprudence, it seems now to have been repudiated in Great Britain.[1] Though it has received considerable countenance in this country, it was repudiated in such decisions as Bohn Manuf. Co. *v.* Hollis;[2] Macauley *v.* Tierney;[3] and see the forcible and eloquent argument of Caldwell, J., in Hopkins *v.* Oxley Stave Co.[4]

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[1] See Kearney *v.* Lloyd, L. R. 26 Ir. 268 (1890); Huttley *v.* Simmons, [1898] 1 Q. B. 181.

[2] 54 Minn. 223, 234 (1893).

[3] 19 R. I. 225 (1895).

[4] 83 Fed. Rep. 912, 930 (C. C. A. Eighth Cir., 1897).